

**MENTAL COMPETENCY — Standard for competency to waive the right to counsel and represent oneself; Arizona standard differs from Federal standard
Revised 1/2010**

"The federal and state constitutions guarantee the right to waive counsel and to represent oneself." *State v. Djerf*, 191 Ariz. 583, 590, 959 P.2d 1274, 1281-2 (1998), *citing* the Sixth and Fourteenth Amendments to the United States Constitution; Article 11, § 24 of the Arizona Constitution; *Faretta v. California*, 422 U.S. 806, 836, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); and *Montgomery v. Sheldon*, 181 Ariz. 256, 259, 889 P.2d 614, 617 (1995). The right to waive counsel and represent oneself is derived from the Sixth Amendment right to counsel and applies to the states through the due process clause of the federal constitution. "Self representation is a 'fundamental constitutional right.'" *State v. Djerf*, 191 Ariz. 583, 591, 959 P.2d 1274, 1282 (1998), *quoting* *Montgomery v. Sheldon*, 181 Ariz. 256, 259, 889 P.2d 614, 617 (1995). Like other fundamental rights, the right to counsel is protected by ensuring that any waiver of the right to counsel is made knowingly, voluntarily, and intelligently. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378 (1981).

A defendant rarely benefits from rejecting counsel and representing himself, but, whether or not it is prudent, he has a right to do so. In *State v. Cornell*, 179 Ariz. 314, 878 P.2d 1352 (1994), Cornell shot and killed his former girlfriend and shot and wounded her father. At trial, Cornell represented himself and claimed that at the time of the offenses, he had suffered from "a special form of temporary insanity that was triggered by a specific event." *Id.* at 322, 878 P.2d at 1360. He was convicted of murder and other offenses and sentenced to death. On appeal, he argued that the trial court should have warned him that an insanity defense was incompatible with self-

representation. He contended that a court should never allow a defendant raising an insanity defense to represent himself, and asserted that the trial court should have advised him "that jurors simply will not believe that a person competent enough to conduct a trial could have been so insane only a short time earlier as to avoid criminal responsibility." *Id.* at 323, 878 P.2d at 1361. The Arizona Supreme Court rejected this claim:

Although it may not be wise to combine an insanity defense with self-representation, Defendant's argument confuses the wisdom of his waiver with its constitutional propriety. It amounts to a complaint that, even if Defendant knew what he was doing, and thus had the right to waive counsel, the court should have stopped him from making an unwise choice. The court does not have this power: the law guarantees a defendant the right to waive counsel if he is mentally competent to do so. *Faretta*, 422 U.S. at 834, 95 S.Ct. at 2541 (*quoting Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (1970)) (although defendant may conduct defense to his own detriment, "his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'").

Id. at 324.

It is clear that in the federal courts, if a defendant is competent to stand trial, he is competent to choose to represent himself. The United States Supreme Court has unequivocally ruled that the trial court is not Constitutionally required to make any separate determination as to whether the defendant was competent to waive counsel.

Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685 (1993). However,

the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States*, 326 U.S. 402 (1960)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Indiana v. Edwards, 554 U.S. —, —, 128 S.Ct. 2379, 2387-88 (2008).

The Arizona courts insist on separate hearings to determine competency to stand trial and to waive a right to counsel. In *State v. Cornell*, 179 Ariz. 314, 322, 878 P.2d 1352, 1360 (1994), a post-*Moran* opinion, the Arizona Supreme Court referred to competence to waive counsel as a separate determination. "Had defendant been alleged to be insane at the time of trial, the trial court would have been required to hold a hearing on his competence to waive counsel, even if there had already been a finding that he was competent to stand trial." *Id.*, citing *Westbrook v. Arizona*, 384 U.S. 150, 86 S.Ct. 1320 (1966) (a pre-*Moran* opinion). And, as recently as 1998, the Arizona Supreme Court stated that "[a] competency hearing may be had for the purpose of determining whether the defendant is mentally able to stand trial, as well as to determine whether the defendant is competent to conduct his own defense." *State v. Djerf*, 191 Ariz. 583, 591, 959 P.2d 1274, 1282 (1998).